

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
LYNCHBURG DIVISION**

D.B., ET AL.,

*Plaintiffs,*

v.

BEDFORD COUNTY SCHOOL BOARD,

*Defendant.*

CIVIL ACTION NO. 6:09-CV-00013

MEMORANDUM OPINION

NORMAN K. MOON

SENIOR UNITED STATES DISTRICT JUDGE

“D.B.,” a minor bringing suit by and through his mother, “A.B.,” who also sued in her own behalf, filed this action pursuant to the Individuals with Disabilities Education Act (the “IDEA” or the “Act”), 20 U.S.C. § 1400, *et seq.*, asking the court to review an administrative due process hearing and the Hearing Officer’s finding that Defendant, the Bedford County School Board, had provided D.B.<sup>1</sup> a free and appropriate public education as required by the Act. On April 23, 2010, I granted Plaintiffs’ motion for summary judgment, and denied Defendant’s motion for summary judgment. Thereafter, Plaintiffs submitted a motion for entry of judgment (docket no. 77), which includes a motion for attorney’s fees.<sup>2</sup>

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<sup>1</sup> D.B. is an African-American child, born on March 13, 1999. Now 11 years old, D.B. was 9 years old at the time of the due process hearing at issue in this action, which was held on October 23, 24, and 25, 2008.

<sup>2</sup> Pursuant to the pretrial order entered in this action on April 21, 2009, nondispositive matters have been referred to United States Magistrate Judge Michael F. Urbanski. All other matters related to Plaintiffs’ motion for judgment (docket no. 77) have been referred to Judge Urbanski, pursuant to 28 U.S.C. § 636(b)(1), to conduct such proceedings as will enable him to submit to this court proposed findings of fact, conclusions of law, and a recommended disposition. *See* docket no. 102 at n. \*.

The matter is before me now on consideration of Defendant's motion (docket no. 88) seeking a stay on appeal,<sup>3</sup> purportedly pursuant to Federal Rule of Civil Procedure 62(d), of my decision of April 23, 2010. The crux of the motion is that I should stay any ruling on Plaintiffs' proposed order of judgment requesting tuition reimbursement and attorney's fees and costs.<sup>4</sup> For the reasons stated herein, the motion for stay (docket no. 88) will be denied without prejudice to Defendant's right to file a renewed motion for stay with bond on appeal, pursuant to Rule 62(d), once judgment is entered.

## I.

Raising new and previously rehearsed contentions, the bulk of Defendant's motion asserts that it will likely prevail in the appeal, and that I should stay the entry of judgment for that reason. As discussed herein, Defendant has not "made a strong showing that [it] is likely to succeed on the merits." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (four-factor test for determining whether to grant a stay); *see also Nken v. Holder*, 556 U.S. \_\_\_, \_\_\_, 129 S. Ct. 1749, 1756 (2009) (same).

## A.

Defendant states that I "incorrectly applied the standard of review in this case," having "failed to give due weight to the findings of the administrative proceeding." Defendant cites *Doyle v. Arlington County School Bd.*, 953 F.2d 100, 105 (4th Cir. 1991), in support of its

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<sup>3</sup> Although judgment has not been entered, Defendant filed its notice of appeal on May 20, 2010. "A notice of appeal filed after the court announces a decision or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry." Fed. R. Civ. P. 4(a)(2).

<sup>4</sup> On June 29, 2010, the parties filed a joint motion for suspension of further decision or action (docket no. 101), asking the court to suspend any decisions regarding then-pending motions while the parties attempted to negotiate a settlement. I granted the motion. *See* docket no. 102. However, the time allotted in the order has expired, and the parties have not reported that their attempts at settlement were successful.

assertion that “[t]he due process hearing officer’s findings of fact in this case were regularly made and, as such, were entitled to be considered *prima facie* correct.” In Defendant’s view, I “inappropriately rejected the hearing officer’s findings of fact in this case.”

The “regularly made” standard cited by Defendant refers to procedural regularity. *See Hogan v. Fairfax County School Bd.*, 645 F. Supp. 2d 554, 569 (E.D. Va. 2009) (citing *J.P. ex rel. Peterson v. County School Bd. Hanover*, 516 F.3d 254, 259 (4th Cir. 2008)). In the instant case, Plaintiffs raised no challenge to the procedural regularity of the due process hearing, and my review of the record revealed no procedural irregularity. “[W]hen fact-findings are regularly made and entitled to *prima facie* correctness, the district court, if it is not going to follow them, is required to explain why it does not.” *Doyle*, 953 F.2d at 105; *see also Hogan*, 645 F. Supp. 2d at 561 (“[w]hen factual findings are ‘regularly made,’ and thus entitled to a presumption that they are *prima facie* correct, the district court must explain any disagreements it has with or deviations it takes from those findings”) (citations omitted).

The facts and issues in this case were thoroughly set forth and examined in my memorandum opinion of April 23, 2010. In that opinion, I explained why I did not follow the factual findings of the hearing officer (“HO”). IDEA actions “are procedurally unique in that they are independent civil actions in which the district court considers the record of the state administrative hearing, as well as any new evidence offered by a party, and makes findings based on the preponderance of the evidence.” *Hogan*, 645 F. Supp. 2d at 561 (citations omitted); *see also* 20 U.S.C. § 1415(i)(2)(C). My review of the record disclosed that the HO had committed errors of law and fact, and I concluded that, according due weight to the HO’s fact-findings, the preponderance of the evidence indicated the following: that Defendant had failed to correctly evaluate D.B., a student whom Defendant concedes is disabled under the IDEA, for

specific learning disabilities (“SLD”); that Defendant had failed to design an Individual Education Plan (“IEP”) reasonably calculated to result in an educational benefit to D.B.; that Defendant had failed to provide for an educational placement suited to D.B.’s educational needs; and that Defendant had therefore failed to provide DB with a free and appropriate public education (“FAPE”), as required by the IDEA. Defendant’s conclusory assertions that I “failed to give due weight to the findings of the administrative proceeding” and “inappropriately rejected the hearing officer’s findings of facts in this case” do not persuade me that I failed to sufficiently explain why I did not follow the HO’s fact-findings.

**B.**

Regarding my finding that Defendant failed to evaluate D.B. for SLD, Defendant asserts that I “did not give appropriate consideration to the fact that the parent consented to all previous eligibility decisions and identified disabilities,” that “[a]t no time prior to the filing for the due process hearing did the parent assert that she believed the student had a learning disability or that the previous disability determination was somehow incorrect,” and that, “[a]s a result, the due process hearing request with regard to this issue was prematurely filed.” Defendant quotes *Combs v. School Bd. of Rockingham County*, 15 F.3d 357, 363-364 (4th Cir. 1994),<sup>5</sup> to support its statement that it “was not ‘given adequate notice of problems,’ nor was it ‘given sufficient time to respond to those problems before [being] held liable for failure to act.’” In Defendant’s view, “[b]ecause the parent raised no concerns regarding the student’s eligibility classification or evaluations prior to filing for the due process hearing, the parent failed to provide the School

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<sup>5</sup> *Combs* is hardly relevant here. In *Combs*, a handicapped student brought an action under the IDEA, seeking to recover attorney’s fees accrued in administrative proceedings against school board. In the administrative proceedings, the School Board’s actions were deemed to be in accordance with the IDEA, but later the School Board made some changes comporting with Plaintiff’s demands. The court of appeals agreed with the district court that Plaintiff was not a “prevailing party” and was therefore not entitled to an award of attorney’s fees.

Board with adequate notice as is required by law.”

On review of the record, this appears to be the first time that Defendant has argued that it was taken by surprise by the dispute over D.B.’s evaluation for SLD.<sup>6</sup> It is certainly the first time Defendant has alleged to this court that Plaintiffs failed to provide Defendant with adequate notice of the dispute over the failure to evaluate for SLD.<sup>7</sup> Defendant’s answer (docket no. 6) asserts that, “[a]t all relevant and appropriate times, defendant identified and evaluated [D.B.] as a child with a disability,” and that Defendant “specifically denies any allegation that it did not fully and properly evaluate [D.B.] for disabilities,” but makes no mention of Plaintiffs having failed to properly notify Defendant of the issue. Defendant’s motion for summary judgment (docket no. 37) asserts that Defendant “correctly evaluated D.B. for all suspected disabilities,” and observes that “[t]he Hearing Officer determined that there was insufficient evidence presented to find that D.B. was improperly evaluated, identified or classified,” but makes no mention of Plaintiffs having failed to provide adequate notice of the issue. In Defendant’s reply to Plaintiffs’ brief in opposition to Defendant’s motion for summary judgment (docket no. 54),

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<sup>6</sup> Defendant implicitly presents this new argument as an affirmative defense that Plaintiffs failed to properly exhaust their administrative remedies. Even were it true that Plaintiffs had failed to provide adequate notice of a dispute over the failure to evaluate D.B. for SLD, “‘a party’s failure to raise an affirmative defense in the appropriate pleading’ generally ‘results in waiver.’” *Emergency One v. American Fire Eagle Engine Co., Inc.*, 332 F.3d 264, 270 (4th Cir. 2003) (citation omitted). To be sure, Defendant has hired new counsel since I issued my memorandum opinion of April 23, 2010; however, hiring new counsel does not give a civil litigant an opportunity to re-litigate a case, or to raise new issues or defenses it failed to raise earlier.

<sup>7</sup> Although Defendant asserts that “[a]t no time prior to the filing for the due process hearing did the parent assert that she believed the student had a learning disability or that the previous disability determination was somehow incorrect,” the record suggests that the issue was raised, possibly by Defendant. The record of the IEP meeting of July 10, 2008, states that Mrs. Robertson, Defendant’s “Administrative Assistant for Special Services,” “proposed,” *inter alia*, that Defendant would “consider completing D.B.’s triennial comprehensive evaluation earlier than currently scheduled to identify service needs.” S.A.R. 1237. Mrs. Robertson’s letter of July 11, 2008, to A.B., regarding the IEP meeting of July 10, 2008, stated that “[w]e offered consideration to update evaluation components. . . .” S.A.R. 1274. And, although the characterization is a stretch (about which, more later), Defendant states in the instant motion that it “proposed a reevaluation of D.B. on July 10, 2008.”

Defendant argues that D.B. was properly evaluated, but raises no argument that Plaintiffs had failed to notify Defendant of the issue. Defendant's brief in opposition to Plaintiffs' motion for summary judgment (docket no. 55) asserts that one of its witnesses at the due process hearing "did agree that D.B. should have been evaluated for [SLD] and testified . . . 'I believe he was,'" but Defendant's brief raises no argument that Plaintiffs had failed to notify Defendant of the issue. Furthermore, as I observed in my opinion of April 23, 2010, the record discloses that Defendant maintained at the due process hearing that D.B. had been correctly evaluated, and submitted its argument in support of its position in writing to the HO.<sup>8</sup> Given these facts and the posture of the case, I cannot accept Defendant's new argument that Plaintiffs failed to provide adequate notice to Defendant of the dispute.

### C.

Defendant asserts that it "cannot be held in violation for implementing an IEP or eligibility decision that the parent signed granting consent to implement." In support of this assertion, Defendant cites *MM ex rel. DM v. School Dist. of Greenville County*, 303 F.3d 523, 533 n. 14 (4th Cir. 2002) (quoting *Cleveland Heights-Univ. Heights Sch. Dist. v. Boss*, 144 F.3d 391, 398 (6th Cir. 1998)), parenthetically including the following quote from *MM*: "a parent may 'naturally' not 'use the fact that the District complied with their wishes as a sword in their

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<sup>8</sup> This issue was thoroughly examined in my memorandum opinion and order of April 23, 2010. Defendant's written and oral arguments to the HO clearly indicate that, regarding Defendant's arguments that it had properly evaluated D.B. for SLD, Defendant failed to recognize that "mental retardation" ("M.R."), S.L.D., and "other health impaired" ("O.H.I.") are separate and distinct categories of disability, and that M.R. and S.L.D. are explicitly contraindicated by the IDEA. Stipulated Administrative Record ("S.A.R.") 2270-2327. In its written argument, Defendant argued that "[t]he evidence is clear that the potential classification of SLD was examined and ruled out during the evaluations. The basis of a SLD designation would have been mental retardation as a result of [D.B.'s] low cognitive scores." S.A.R. 2286-87. However, this is clearly erroneous, given that, pursuant to the pertinent regulations, S.L.D. and M.R. are contraindicated, *i.e.*, they are mutually exclusive, and thus M.R. would *not* have formed "[t]he basis of a SLD designation."

IDEA action.’’ That quote, however, is taken out of context, and is inapposite here.

The footnote from which Defendant quotes refers to a placement that the parents of an autistic child had affirmatively sought and been granted as an accommodation to their preferences. *Id.* at 528-29. MM’s parents apparently later refused to continue with that placement, canceled the subsequent IEP team meeting, and no further IEPs were finalized for MM. *Id.* at 529. The district court found, *inter alia*, that MM had not been provided a FAPE for one of the previous years when MM had been in her parents’ preferred placement. *Id.* at 530. The United States Court of Appeals for the Fourth Circuit reversed as to that claim, finding that the district court, in assessing whether an IEP for a particular school year constituted a FAPE, had “failed to consider and accord weight to [MM’s] actual educational progress,” and that “courts should endeavor to rely upon objective factors, such as actual educational progress. . . .” *Id.* at 532. The Fourth Circuit held that, “[b]ecause the district court . . . failed to appropriately defer to the professional educators, we reverse its award of summary judgment on that issue.” *Id.* at 533. In *dicta*, the Fourth Circuit noted that, “[a]s a general matter, it is inappropriate, under the IDEA, for parents to seek cooperation from a school district, and then to seek to exact judicial punishment on the school authorities for acceding to their wishes.” *Id.* at 533 n. 14.

In short, the parents in *MM* challenged the suitability of an IEP that had actually advanced MM’s educational progress, and the quoted footnote simply underscores that this placement was an affirmative accommodation to the parents’ preferences. Here, the IEPs at issue did not advance D.B.’s educational progress, and Defendant executed no placement for D.B. in any act of affirmative accommodation of his mother’s wishes. I believe that my memorandum opinion of April 23, 2010, makes it clear that neither of these circumstances is present in the instant case.

**D.**

Defendant asserts that I “failed to require the following the [*sic*] appropriate process to change a student’s disability identification,” and that “[a] change in identification can only be considered through the eligibility process, not by the Court.” However, I did not “change” D.B.’s “disability identification.” Rather, I found that Defendant had failed to properly evaluate D.B. for SLD. This issue is treated at length in my memorandum opinion of April 23, 2010, and I will not revisit it further here.

**E.**

Defendant refers to the psychological report of March 12, 2007, as indicating “that the student would not even qualify as a student with a learning disability as he did not meet the applicable criteria.” In Defendant’s view, “[n]o severe discrepancy between the student’s achievement and ability was present, as is required by law. As a result, the student could not be found eligible for SLD.” However, I have previously explained, in my opinion of April 23, 2010, that “[a]lthough the record indicates that D.B received psychological testing, there is no indication that Defendant used this testing to evaluate him for specific learning disability, or to make any eligibility determinations regarding specific learning disability, and the HO erred in determining that BCPS had properly evaluated him as a child with a disability.”

Furthermore, Defendant is incorrect when it contends that “a severe discrepancy between a student’s achievement and intellectual ability *must* exist in order for a student to qualify as a student with a learning disability.” (Emphasis added.) In fact, federal law requires that “[a] State *must* adopt . . . criteria for determining whether a child has a specific learning disability,” and “the criteria adopted by the State . . . [*m*]ust not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific

*learning disability. . .*” 34 C.F.R. § 300.307(a) (emphasis added). And, although Defendant cites the then-effective predecessor regulation<sup>9</sup> from the Virginia Administrative Code, 8 VAC 20-80-56(G)(2), in support of its proposition that “a severe discrepancy between a student’s achievement and intellectual ability must exist in order for a student to qualify as a student with a learning disability,” that predecessor regulation, 8 VAC 20-80-56(G), actually states, in pertinent part:

G. Criteria for determining the existence of a specific learning disability. The group [of qualified professionals, defined in 8 VAC 20-80-56(B)] may determine that a child has a specific learning disability if:

1. The child does not achieve commensurate with the child’s age and ability levels in one or more of the areas listed in subdivision 2 of this subsection if provided with learning experiences appropriate for the child’s age and ability levels; and
2. The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas:
  - a. Oral expression;
  - b. Listening comprehension;
  - c. Written expression;
  - d. Basic reading skill;
  - e. Reading comprehension;
  - f. Mathematical calculations; or
  - g. Mathematical reasoning.
3. The group may not identify a child as having a specific learning disability if the severe discrepancy between ability and achievement is primarily the result of:
  - a. A visual, hearing, or motor impairment;
  - b. Mental retardation;

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<sup>9</sup> When I refer to the “then-effective” Virginia regulations, I am referring to those regulations that were in effect in October 2008, at the time of the due process hearing. As I noted several times in my earlier opinion, the then-effective Virginia Administrative Code as to special education regulations, 8 Va. Admin. Code § 20-80, was superseded on July 7, 2009 by 8 Va. Admin. Code § 20-81.

- c. Emotional disturbance; or
- d. Environmental, cultural, or economic disadvantage.

That regulation requires a more complicated evaluation of the child, and of the discrepancies between achievement and ability, than is implied by Defendant's simplistic assertion that "a severe discrepancy between a student's achievement and intellectual ability must exist in order for a student to qualify as a student with a learning disability."<sup>10</sup>

Defendant adds that "there is no requirement that a student even be identified by a particular disability level." Defendant cites 8 VAC 20-80-56(H), the then-effective state regulation, which stated that "[n]othing in this chapter requires that children be *identified* by their disability, as long as each child has a disability under this chapter and by reason of that disability needs special education and related services and is regarded as a child with a disability." (Emphasis added.) However, regardless of whether a child must be *identified* by its disability, I explained in my previous opinion that the IDEA requires that "[e]ach local

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<sup>10</sup> I add that this is the first time Defendant has raised the "requirement" of a severe discrepancy between achievement and intellectual ability. However, Defendant's memorandum in support of its motion for summary judgment (docket no. 39) states the following (verbatim quote):

68.Elizabeth Robertson testified during the administrative due process hearing that D.B. made progress which was commensurate with his abilities. (SAR#1, p.700)

69.This same testimony was given by several other witnesses. (SAR#1, p.985; SAR#1, pp. 1094-1095; SAR#1, pp.1106-1107; SAR#1, p.1138)

70.Elizabeth Robertson gave the only testimony from a psychologist at the due process hearing.

71.Elizabeth Robertson testified upon comparing scores with certain data that "the achievement is consistent with the predictions that could be concluded from the ability data". (SAR#1, p.812)

72.Ms. Robertson also testified that "academic achievement measures that are recorded are in line with and commensurate with the general cognitive ability of a student which would indicate that a student is achieving at a level consistent with ability prediction." (SAR#1, p. 812)

Thus, regardless of D.B.'s particular disability, it was clear at the due process hearing that D.B.'s failure to progress in any meaningful way was the highest level of achievement that he could possibly obtain in the mainstream inclusion setting. This underscores my finding that the goals, services, and placement proposed for D.B. in the IEP for 2008-2009 were not reasonably calculated to confer an educational benefit beyond minimal academic advancement; that the marginal benefits of continuing to attempt to educate D.B. in a mainstream inclusion setting were outweighed by his educational needs; and that Defendant had failed to provide D.B. a free and appropriate education.

educational agency *shall* ensure that . . . the child is *assessed* in *all areas of suspected disability*.” 20 U.S.C. § 1414(b)(3)(B) (emphasis added). The applicable Virginia regulations, then and now, accord with the IDEA, and require such assessments. *See* 8 VAC 20-80-56, “**Eligibility**” (repealed); 8 VAC 20-81-80, “**Eligibility**” (effective July 7, 2009). For example, the then-applicable 8 VAC 20-80-56(C), “Procedures for determining eligibility,” requires the following:

(7). For a child suspected of having a specific learning disability, the documentation of the group’s determination of eligibility must also include a statement of:

- a. *Whether the child has a specific learning disability;*
- b. *The basis for making the determination;*
- c. The relevant behavior noted during the observation of the child;
- d. The relationship of the behavior to the child’s academic functioning;
- e. The educationally relevant medical findings, if any;
- f. Whether there is a severe discrepancy between the child’s achievement and ability that is not correctable without special education and related services; and
- g. The determination of the group concerning the effects of any environmental, cultural, or economic disadvantage.

(Emphasis added.)

At this point, surely it is a given that D.B. must have been “a child suspected of having a specific learning disability” under 8 VAC 20-80-56(C)(7), considering Defendant’s insistence all along that it evaluated D.B. for SLD (despite the scarcity of evidence to support that insistence).<sup>11</sup> And, as demonstrated in my memorandum opinion of April 23, 2010, the record does not disclose that the documentation of D.B.’s eligibility includes a statement of these factors – most significantly, there is no statement of “[w]hether the child has a specific learning

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<sup>11</sup> For example, Defendant’s motion for summary judgment (docket no. 55) asserts that one of its witnesses at the due process hearing agreed “that D.B. should have been evaluated for [SLD] and testified . . . ‘I believe he was.’”

disability” and “[t]he basis for making the determination.” 8 VAC 20-80-56(C)(7)(a) & (b).

Regardless of the special education services Defendant provided to D.B., I have already explained my conclusions that Defendant failed to provide D.B. a FAPE. To the extent Defendant asserts that I did not give sufficient “deference to the judgment of the educational professionals in this case,” I again refer to my opinion of April 23, 2010.

***F.***

Defendant asserts that I “applied the wrong state regulations” when determining that “the School Board improperly evaluated the student for SLD.”<sup>12</sup> Defendant maintains that I “focused [my] analysis on” Virginia Administrative Code eligibility regulations that were not effective until “nearly nine months after the administrative due process hearing was held.” Defendant is incorrect. My focus was on the applicable federal regulations, and I merely referred in footnotes to certain state regulations – both the current and the then-effective predecessor regulations, and specifically noting the repeal of the predecessor regulations – to demonstrate that those regulations tracked the requirements set forth in the federal regulations.

***G.***

Defendant contends that I “incorrectly determined that the IEPs were inappropriate,” asserting that I “conducted a retrospective analysis of the effectiveness of the student’s IEPs,” which was “not proper.” Defendant raises no new issue of fact or law to cause me to revisit my conclusions of April 23, 2010. My earlier opinion explains, *inter alia*, my prospective determination that, regardless of D.B.’s particular disability – whether an “other health impairment” or a “specific learning disability” – the goals, services, and placement proposed for

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<sup>12</sup> I pause to underscore that I did not find that “the School Board *improperly evaluated* the student for SLD”; rather, I found that Defendant had failed to evaluate D.B. for SLD as required by the IDEA.

D.B. in the IEP for 2008-2009 were not reasonably calculated to confer an educational benefit beyond minimal academic advancement; that the marginal benefits of continuing to attempt to educate D.B. in a mainstream inclusion setting were outweighed by his educational needs; and that Defendant had failed to provide D.B. a free and appropriate education.<sup>13</sup>

## ***H.***

Defendant asserts that I “incorrectly determined that Plaintiffs were entitled to tuition reimbursement.”

### **1.**

Defendant asserts that I

should not have awarded tuition reimbursement in this case. Private school tuition reimbursement can be awarded as a remedy under the IDEA only “if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment *and that the private placement is appropriate.*” 34 C.F.R. § 300.148(c) (emphasis added). This mandatory two-part inquiry has been confirmed by the U.S. Supreme Court: “Parents ‘are entitled to reimbursement only if a federal court concludes both that the public placement violated the IDEA and the private school placement was proper under the Act.’” *Forest Grove Sch. Dist., v. T.A.*, 129 S.Ct. 2484, 2496 (2009) (citing *Florence County Sch. Dist. Four v. Carter*, 114 S.Ct. 361). While the Court made a finding that the school division had not made FAPE available to the student, the Court made no finding at all on the appropriateness of the private placement. Without such a finding, there can be no order of tuition reimbursement. *Id.*

(Verbatim quote.)

However, I did, in fact, specifically find that, having “already established that Defendant failed to provide a FAPE to D.B.,” Defendant had

not successfully rebutted Plaintiffs’ argument that [New Vistas School] is an appropriate educational placement for D.B.<sup>□</sup> See *School Committee of Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 370 (1985) (in order to receive reimbursement, the private education services obtained by the

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<sup>13</sup> See also n. 10, *supra*.

parents must be appropriate to meet the child's needs).

In sum, I found that the private placement at NVS is appropriate. I further noted that “[t]he HO found that New Vistas is ‘a private school located in Lynchburg, Virginia . . . exclusively for disabled children’ and that ‘[i]t is licensed by the Commonwealth of Virginia as a special education private day school.’”

## 2.

Regarding Defendant's assertion that Plaintiffs did not give Defendant proper notice of their intent to remove D.B. from the public school placement before doing so, I repeat again that this issue was previously raised and addressed in my opinion of April 23, 2010.

## 3.

Defendant asserts that I

should have considered the parent's lack of cooperation in the evaluation process. A parent's failure to cooperate with the school division in its efforts to evaluate the student diminishes the parent's right to recover reimbursement for a unilateral private placement. The School Board proposed a reevaluation of D.B. on July 10, 2008. The parent, however, refused consent to this reevaluation. S.A.R. 1237, 1274. The parent's lack of cooperation in the reevaluation process deprived the school division of a reasonable opportunity to conduct an evaluation of the student. As a result, any award for tuition reimbursement should have been reduced or denied. *See* 20 U.S.C. § 1412(a)(10)(C)(iii); *see also Hogan v. Fairfax County Sch. Bd.*, 645 F.Supp.2d 554, 571 (E.D. Va. 2009) (the lack of parental consent to a requested evaluation is a reason for a reduction in reimbursement).

However, it is a stretch, at best, to assert that Defendant “proposed a reevaluation of D.B. on July 10, 2008,” that A.B. “refused consent to this reevaluation,” and that A.B.'s “lack of cooperation in the reevaluation process deprived the school division of a reasonable opportunity to conduct an evaluation of the student.” Defendant did not “propose[] a reevaluation of D.B.”; rather, the record of the IEP meeting of July 10, 2008, indicates that Mrs. Robertson,

Defendant's "Administrative Assistant for Special Services," "proposed," *inter alia*, that Defendant would "**consider** completing D.B.'s triennial comprehensive evaluation earlier than currently scheduled to identify service needs."<sup>14</sup> S.A.R. 1237 (emphasis added). Mrs. Robertson's letter of July 11, 2008, to A.B., regarding the IEP meeting of July 10, 2008, stated that "[w]e offered **consideration** to update evaluation components. . . ." S.A.R. 1274 (emphasis added). Defendant "proposed" only to "consider" re-evaluating D.B., and thus did not extend any affirmative offer to re-evaluate D.B. in advance of the regular triennial schedule for re-evaluation. Accordingly, A.B. could not have "refused consent," given that Defendant did not actually "propose[] a reevaluation." Moreover, A.B. did not "refuse[] consent" to "a reevaluation of D.B. on July 10, 2008," given that, after the IEP meeting of July 11, 2008 (prior to enrolling D.B. at New Vistas, and prior to requesting the due process hearing), she sought mediation in an attempt, according to the record, "to resolve the disagreement over placement." S.A.R. 1274-75, 1237, 1233, 1226.

Moreover, Defendant's characterization of *Hogan* is inaccurate, and the circumstances in *Hogan* and this case do not compare. *Hogan* observed that "the Parent's lack of immediate cooperation on certain testing issues did not single-handedly derail the IEP process," but was "one of several examples of obstructive or uncooperative parental behavior." 645 F. Supp. 2d at 570. Accordingly, the court imposed a one-sixth reduction on the reimbursement amount to "reflect[] the Parent's contribution to the Student's non-attendance at school during the 2005-2006 school year." *Id.* at 571. In the instant case, however, Defendant points to no examples of "obstructive or uncooperative parental behavior" other than the alleged refusal to consent to a re-

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<sup>14</sup> The record discloses that D.B.'s most recent re-evaluation occurred on March 23, 2007, and that the next re-evaluation "must occur" before March 23, 2010. S.A.R. 1232.

evaluation, which I have already addressed.

In *Hogan*, “[t]he Parent was difficult to reach by mail or by phone, . . . and he acted secretly in discussions with a different Fairfax County entity. . . .” *Id.* at 570. “[R]eading the e-mails and letters exchanged between the Parent and other FCPS [Fairfax County Public School] personnel leads to the inescapable conclusion that the Parent was communicating, from the start of the new IEP process, with an eye toward creating a record.” *Id.* at 571. The court found that, although it could “be argued that . . . the Parent was simply being overly cautious. . . . [t]he Parent’s communications with FCPS personnel were preemptively adversarial in tone and contributed to the lack of true cooperation, and the ultimate breakdown in communication, between the parties.” *Id.* “The Hearing Officer, who heard all of the evidence through live testimony and was able to evaluate the credibility of the witnesses, was obviously impressed with the Parent’s ‘unreasonable . . . communication activities,’” and the court “agree[d] with this assessment.” *Id.* The court in *Hogan* thus found that, “[t]aken together,” the IEP process had been “partially obstructed” by the parent’s actions, “including a method of communication that made cooperation more difficult and his refusal to consent to several requested tests. . . .”<sup>15</sup> *Id.*

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<sup>15</sup> Significantly, *Hogan* does not “lay the blame entirely, or even mostly, at the feet of the Parent.” 645 F. Supp. 2d at 571. *Hogan* observed that

[i]t is clear from the record that FCPS personnel were ultimately responsible for the failure to provide a FAPE for the Student. The Parent’s actions may have made the IEP process more fraught, but they did not single-handedly derail it. . . .

\* \* \*

If the Parent had been fully cooperative, easier to communicate with, and more amenable to providing the requested testing, it is much less likely that the Student would have had only twelve weeks of instruction during the 2005-2006 school year. On the other hand, FCPS, intentionally or not, let the Student fall off of its proverbial radar screen. Even considering the  
(continued...)

In short, the record discloses that the circumstances of the instant case are not at all similar to *Hogan*. And, contrary to Defendant's assertion, A.B. did not "fail[] to cooperate with the school division in its efforts to evaluate the student. . . ."

### III.

In determining whether to grant a stay, a court should consider the following four factors:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of a stay will substantially injure other parties interested in the proceeding; and (4) where the public interest lies.

*Hilton v. Braunskill*, *supra*, 481 U.S. at 776, *see also Nken v. Holder*, *supra*, 556 U.S. at \_\_\_, 129 S. Ct. at 1756.

I have already addressed Defendant's showing of likelihood of success on the merits. Defendant also contends that it will suffer irreparable injury if the stay is not granted, asserting that "the combined reimbursement expense for the School Board could be as high as

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<sup>15</sup>(...continued)

at-times unreasonable actions of the Parent, the onus to provide a FAPE lay with the FCPS, not the Parent.

Decisions on reimbursement reduction are equitable, and as such are not reducible to a set formula. The Court finds that the Hearing Officer correctly determined that some reduction in reimbursement is justified. However, the Court believes that the Hearing Officer focused too narrowly on the Parent's failures in what was obviously a frustrating and emotionally difficult series of decisions regarding the education of his child. The Court finds that a one-sixth reduction, rather than a one-third reduction, better reflects the Parent's contribution to the Student's non-attendance at school during the 2005-2006 school year.

*Id.* I note also that the court in *Hogan* found that the student was also "entitled to some level of compensatory education. . . . for the Student's failure to receive a FAPE during the 2005-2006 school year." *Id.* at 575. The court found, *id.*,

that an award of eight weeks of summer-level education is an appropriate equitable compensation for the Student's loss of a FAPE during the 2005-2006 school year. The award takes into account the behavior of the parties, the evidence that the Student regresses when not in an academic environment, and Defendant's efforts, since the 2006-2007 school year, to make up the deficit for which it was largely responsible.

\$94,781.37.”<sup>16</sup> Defendant contends that “[i]t is unlikely the School Board could recover this money once paid even if successful in its appeal.” This particular contention is puzzling, however, as it appears to ignore that a stay with bond on appeal, pursuant to Rule 62(d), would completely protect Defendant should it prove successful on appeal.

Rule 62, “**Stay of Proceedings to Enforce a Judgment**,” states, in pertinent part:

**(d) Stay with Bond on Appeal.** If an appeal is taken, the appellant may obtain a stay by supersedeas bond. . . . The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

Although it is widely held, despite the language of the rule, that a court has the discretion to stay a judgment pending appeal without a supersedeas bond, *see, e.g., Alexander v. Chesapeake, Potomac, Tidewater Books*, 190 F.R.D. 190, 192 (E.D. Va. 1999), the primary duty of the court here is to ““preserve the status quo while protecting the non-appealing party’s rights pending appeal,”” *id.* (quoting *Poplar Grove, etc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1190-91 (5th Cir. 1979)). By its terms, Rule 62(d) provides that an appellant may obtain a stay as a matter of right by filing a supersedeas bond.<sup>17</sup> *Id.*

In light of the fact that a supersedeas bond will protect it from any monetary harm should it succeed on appeal, Defendant has not made a showing that it is likely to suffer irreparable

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<sup>16</sup> Defendant arrives at this number by adding Plaintiffs’ claimed “estimated reimbursement cost” of \$34,309.20 and an “award of attorney’s fees and related costs, which is estimated by Plaintiffs at \$60,472.17.” To be sure, this is a substantial sum of money (and this calculus of alleged irreparable harm does not include Defendant’s own costs and attorneys fees). However, these estimated figures are based on Plaintiffs’ motions, which have not yet been reviewed, and the estimated figures do not reflect any amount of judgment. Judgement has not been entered, and these matters are pending the attention of the magistrate judge, and subsequently will come before me should any party lodge proper objections to the magistrate judge’s report and recommendation.

<sup>17</sup> In the absence of a bond, a stay “is not a matter of right, even if irreparable injury might otherwise result.” *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926); *see also Nken v. Holder*, 556 U.S. \_\_\_, \_\_\_, 129 S. Ct. 1749, 1757 (2009).

harm if the stay is not granted. And, as already discussed, Defendant has not made a strong showing of a likelihood of success on appeal. In light of these factors, I am not swayed by Defendant's somewhat perfunctory arguments that Plaintiffs will not be substantially harmed by the stay and that the public interest would be served by granting the stay. At present, no judgment has been entered in the case, and there is no dollar amount to be stayed by entry of a supersedeas bond. Defendant's contentions involving specific dollar amounts are speculative. Accordingly, it is premature to make any determination whether the bond requirement should be waived or reduced to less than a full bond. When judgment is entered, should Defendant file a renewed motion for stay with bond on appeal, pursuant to Rule 62(d), I will reconsider the matter of waiving or reducing the bond amount.

#### IV.

For the stated reasons, Defendant's motion for stay (docket no. 88) will be denied without prejudice to Defendant's right to file a renewed motion for stay with bond on appeal, pursuant to Rule 62(d), once judgment is entered.

An appropriate order will accompany this memorandum opinion.

Entered this 23rd day of August, 2010.

/s/ Norman K. Moon

NORMAN K. MOON

SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
LYNCHBURG DIVISION

D.B., ET AL.,

*Plaintiffs,*

v.

BEDFORD COUNTY SCHOOL BOARD,

*Defendant.*

CIVIL ACTION No. 6:09-CV-00013

ORDER

NORMAN K. MOON

SENIOR UNITED STATES DISTRICT JUDGE

For the reasons stated in the accompanying memorandum opinion, Defendant's motion for stay (docket no. 88) is DENIED without prejudice to Defendant's right to file a renewed motion for stay with bond on appeal, pursuant to Rule 62(d), once judgment is entered. And, as noted in the accompanying memorandum opinion, all other matters related to Plaintiffs' motion for judgment (docket no. 77) are referred to United States Magistrate Judge Michael F. Urbanski, pursuant to 28 U.S.C. § 636(b)(1), to conduct such proceedings as will enable him to submit to this court proposed findings of fact, conclusions of law, and a recommended disposition.

The Clerk of the Court is directed to send a certified copy of this order and the accompanying memorandum opinion to all counsel of record and to the Honorable Michael F. Urbanski.

It is so ORDERED.

Entered this 23rd day of August, 2010.

/s/ Norman K. Moon

NORMAN K. MOON

SENIOR UNITED STATES DISTRICT JUDGE